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IN THE

Supreme Court of the United States

No. 77-844

MONONGAHELA POWER COMPANY,
Petitioner,

v.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

PETITIONER'S REPLY MEMORANDUM

ALAN P. BUCHMANN
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115

RICHRD S. WEYGANDT,
Vice President
Monongahela Power Company
1310 Fairmont Avenue
Fairmont, West Virginia 26554

EDWARD W. COCHRAN
1800 Union Commerce Building
Cleveland, Ohio 44115

Attorneys for Petitioner,
Monongahela Power Company

ARNOLD O. WEIFORD, ESQ.
CLEMENT R. BASSETT, ESQ.
State Capitol Building
Charleston, West Virginia 25303

Counsel for Respondent,
Public Service Commission
of West Virginia.

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1. The Issue Of Petitioner's Constitutional Right To The Independent Judgment Of A Court Of Law Was Raised In The Court Below.

In Monongahela's Petition for Certiorari, one of the reasons cited for granting the Writ is that West Virginia Code Section 24-5-1 is unconstitutional because it does not provide for an independent judgment as to both law and facts by a court of law as required by the due process clause of the Fourteenth Amendment. *See Ohio Valley Water Co.* v. *Ben Avon*, 253 U. S. 287 (1920). In its brief opposing *certiorari*, the Public Service Commission alleges in Section III of its argument that Monongahela did not raise the issue of the constitutionality of Section 24-5-1 in its appeal to the West Virginia Supreme Court of Appeals, and that therefore, *certiorari* should be denied. On the contrary, the basic issue – a regulated utility's right, as a

matter of constitutional law, to the independent judgment of a court of law — was raised before the Supreme Court of Appeals both in petitioner's brief and in oral argument.

The West Virginia Supreme Court of Appeals was fully aware of the essential question. In its Petition For Appeal, Monongahela expressly pointed out that, in exercising its review powers under that statute, the Court was *required* by the due process clause of the Fourteenth Amendment to make an independent judgment as to both the law and the facts of the case. *See* page 14 of Monongahela's Note of Argument to the West Virginia Supreme Court of Appeals, attached hereto as Appendix A. There is no question but that this issue is properly before this Court.*

Monongahela could not, of course, have in express terms, raised the unconstitutionality of Section 24-5-1 before the West Virginia Supreme Court of Appeals because it had no standing to raise that issue *at that time*. This Court has made it clear that a party has no standing to challenge a statute as unconstitutional unless that party has suffered "injury in fact" due to the operation of the statute. *Association of Data Processing Service Organization* v. *Camp*, 397 U. S. 150 (1970). At the time Monongahela filed its Petition For Appeal with the West Virginia Supreme Court of Appeals, pursuant to Section 24-5-1, it had not been injured in fact because it had not yet been denied the independent judgment of the West Virginia Supreme Court of Appeals as to both the law and the facts of this rate case. Obviously, Monongahela was not injured

*The federal cases discussed by respondent, in which petitioner sought to at least stay the West Virginia Commission's refund order pending appeal (which the Commission and the Supreme Court of Appeals declined to do — an example of West Virginia "due process") turned on a jurisdictional issue, as can be readily seen. The holding is that the Johnson Act, 28 U.S.C. § 1342, "precluded Federal jurisdiction."

in fact until the Supreme Court of Appeals denied its Petition For Appeal. Until that time, the Supreme Court of Appeals could have granted the Petition For Appeal and properly reviewed the case.

Since Monongahela could not have challenged the constitutionality of Section 24-5-1 before the West Virginia Supreme Court of Appeals, its alleged failure to do so cannot constitute a waiver. A person cannot waive a right before he is in a position to assert it. *Chambers & Co.* v. *Equitable Life Assurance Society*, 224 F.2d 338, 345 (5th Cir. 1955).

2. The West Virginia Commission, Which The Court Below Declined To Review, Failed, And Still Fails, To Comprehend The Economic Issue.

Respondent goes to considerable length, outside the record in this proceeding, to demonstrate that Monongahela's coverage ratios are such that it can issue debt. It then asserts "it is a mystery . . . why Monongahela would allege" to this Court that it cannot issue first mortgage bonds. Monongahela made no such allegation to this Court, the court below, or the West Virginia Commission. It never claimed that it could not issue first mortgage bonds in 1977, and as a matter of fact it has, although the amount which could be issued was limited. What it asserted was that the earnings protection of its outstanding senior securities had erroded to such a dangerously low level that, without the rate relief requested, it was evident that within the very near future Monongahela would not be able to raise in an orderly and prudent manner, through the sale of senior securities, the capital necessary to honor outstanding long-term contractual commitments in connection with its ongoing construction program.

The results of the order have now proved that assertion to be correct. The Company was unable to sell sufficient senior securities during 1977 to repay all of its

outstanding short term debt. In addition, the rate increase allowed by the order provided insufficient earnings to support any permanent financing during 1978. Monongahela's correct debt coverages for the last three years, restated to reflect the impact of the decision here appealed from and excluding revenues subject to refund were:

1975	2.61
1976	2.78
1977*	1.96

More important, perhaps, although respondent makes the rather serious charge that Monongahela "is playing games" with the Commission and the courts, respondent makes no mention of the coverages with respect to *preferred stock*. Keeping in mind that in the case of preferred a coverage of 1.5 times is required, the coverages for the last three years, on the same basis as the debt coverages already stated, were as follows:

1975	1.64
1976	1.72
1977*	1.26

It must also be remembered that, whether we are speaking of first mortgage bonds or preferred, the required coverages must exist not only for the month in which the financing is to take place – and *not* for some future period, as respondent seems to imply – but rather for 12 consecutive months within 15 months *preceding* the proposed issue. That is, it is not sufficient to have coverages at a particular point in time; they must be *sustained* and for a *past* period. And, finally, the mere fact that the Company has coverages of 2.0 times (for debt) or 1.5 times (for preferred) does not mean that it can reasonably finance. These are the ***legal minimum*** requirements which must be met in order to permit the Company to *legally* issue securities. Indeed,

*Subject to audit.

it does not even necessarily permit the Company to legally finance, since the 2.0 times test must be met on a *pro forma* basis, i.e. including in the denominator the annual interest required on the securities to be issued. Obviously, for the Company to maintain and support its credit and raise the money necessary for the proper discharge of its public duties, *Bluefield Waterworks and Improvement Company* v. *Public Service Commission*, 262 U.S. 679, 693 (1923), requires substantially more than merely meeting minimum legal requirements. Thus, respondent's Brief in Opposition, which refers to these *legal* requirements as "only an indicator," reflects the same lack of understanding which the Commission evidenced in its orders and in its briefs below.

Furthermore, the Commission's argument that the currently pending rate case would solve these problems is specious. Oral argument is now set for late February 1978, and, unless the Commission is now announcing the outcome of that case, it cannot argue that the question of whether Monongahela can attract capital in 1978 is irrelevant. And, we submit, even if such announcement were possible and proper, it would not justify the Commission's argument. Each rate case must stand or fall on its own record and since coverages are measured by a past period, each year's construction program and the ability of the Company to attract capital must be based on historical revenues, not future possibilities.

CONCLUSION

The issues presented in this and the companion petition for *certiorari* of Potomac Edison Company are serious and have wide implications not only for the petitioners, but for their customers, including the customers which they serve in states other than West Virginia.

The Commission has affirmatively refused to authorize petitioner sufficient revenues to enable it to maintain its

credit and to attract capital. The Supreme Court of Appeals of West Virginia has refused *to even consider the question on its merits.* This Court is, in this case, truly a court of last resort for petitioner and the thousands of people which it serves and hopes to continue to serve in the future. We are advised that similar issues have been raised on appeal by Appalachian Power Company, yet a third electric utility regulated by the West Virginia Commission which, we submit, demonstrates that the Commission's approach to the principles laid down by this Court in the *Bluefield* and *Hope* cases is not an isolated instance arising out of circumstances peculiar to this petitioner.

The petition should be allowed.

Respectfully submitted,

Of Counsel

RICHARD S. WEYGANDT
Vice President
Monongahela Power Company
1310 Fairmont Avenue
Fairmont, West Virginia 26554

EDWARD W. COCHRAN
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115

ALAN P. BUCHMANN
Squire, Sanders & Dempsey
1800 Union Commerce Building
Cleveland, Ohio 44115

Attorneys for Petitioner,
Monongahela Power Company.

APPENDIX A

(1916), this Court stated that this section of "the act creating the public service commission and defining its power and duties . . . gives to anybody feeling himself aggrieved by its final order the right to appeal to this court" with respect to matters such as rates "over which the public service commission was then given jurisdiction."

Shortly after the *Howell* decision, the Supreme Court of the United States, in its review of the decision of the Supreme Court of Appeals of West Virginia in the celebrated landmark *Bluefield* case, *infra*, stated unequivocally (PUR 1923 D at page 17) that:

> "Plaintiff in error is entitled under the due process clause of the Fourteenth Amendment to the independent judgment of the court as to both law and facts. Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, P.U.R. 1920 E, 814, 64 L. Ed. 908, 40 Sup. Ct. Rep. 527."

The *Ben Avon* case cited by the Supreme Court has often been stated to be final authority for the proposition that a reviewing court has the constitutional obligation to review the findings of a public service commission and to give its independent judgment on both facts and law in any case where a question of constitutional confiscation is alleged. The subject is thoroughly reviewed in *"Ben Avon South of the Border"*, 60 W. Va. Law Rev. 166.

In a recent federal court case, *Preston County Light and Power Company* v. *Public Service Commission of West Virginia,* 297 F.Supp. 759 S.D. W. Va. 1969), a three-judge federal court, relying upon precedent established by this Court, described the scope of authority of this Court when it reviews Orders of the Public Service Commission:

> "While a petitioner is not entitled to a 'judicial trial' de novo under this provision, see City of Charleston v. Public Service Commission, 110 W. Va.